

1 IN THE UNITED STATES DISTRICT COURT

2 MIDDLE DISTRICT OF FLORIDA

3 TAMPA DIVISION

4  
5 REBOTIX REPAIR, LLC

6 Plaintiff,

7 vs.

Case No. 8:20-CV-02274

8 INTUITIVE SURGICAL, INC.,

9 Defendant.

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12  
13 REMOTELY CONDUCTED

14 VIDEOTAPED DEPOSITION OF ANTHONY McGROGAN

15 Sunnyvale, California (Witness's location)

16 Monday, June 7, 2021

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18  
19  
20  
21 Stenographically reported by:  
22 LORRIE L. MARCHANT, RMR, CRR, CCRR, CRC  
23 California CSR No. 10523  
24 Washington CSR No. 3318  
25 Oregon CSR No. 19-0458  
Texas CSR No. 11318

Job No. 194226

June 7, 2021

9:06 a.m. PDT

Remotely conducted videotaped deposition  
of ANTHONY McGROGAN, before Lorrie L.  
Marchant, a Certified Shorthand Reporter,  
Registered Merit Reporter, Certified  
Realtime Reporter, California Certified  
Realtime Reporter, Certified Realtime  
Captioner.

A P P E A R A N C E S

(All appearances remotely via Zoom)

APPEARING ON BEHALF OF THE PLAINTIFF:

DOVEL & LUNER

BY: ALEXANDER ERWIG, ESQ.

201 Santa Monica Boulevard

Santa Monica, CA 90401

APPEARING ON BEHALF OF THE DEFENDANT:

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

BY: MICHAEL FOLGER, ESQ.

ALLEN RUBY, ESQ.

One Manhattan West

New York, NY 10001

ALSO PRESENT:

Danielle Greene, Videographer

---oOo---

1 Q. Well, do you have a sense of the high end?

2 A. You know, I don't know the -- the bounds.

3 In general, it's -- if it goes in to follow, it's

4 very likely to decrement a use even for a short

5 period of time. But I don't know if that's

6 15 seconds or 5 minutes.

7 Q. Well, so you have a general sense of the

8 fact that surgeries can take varying periods of

9 time; right?

10 A. Sure.

11 Q. Might have a very short surgery where

12 EndoWrists are used for a few seconds or a few

13 minutes; right?

14 A. Yes.

15 Q. You might have other longer surgeries where

16 EndoWrists are used for an hour or two hours; right?

17 A. Yes.

18 Q. And in each of those instances, after the

19 surgery is complete, the EndoWrist would decrement a

20 life from the life counter; right?

21 A. Yes. At a high level, that's true. Again,

22 I don't know the details of the algorithm. But at a

23 high level, yes.

24 Q. Now, let's assume that there is one

25 instrument that's used ten times for about an hour

1 per surgery.

2 Okay? Are you with me?

3 A. Yep.

4 Q. That instrument, according to Intuitive, is  
5 safe to be used for ten uses; right?

6 A. Yes.

7 Q. After those ten uses are up, Intuitive  
8 would tell the hospital you need to throw this  
9 instrument away; right?

10 A. Right.

11 Q. Now, let's take another instrument, same  
12 instrument. Let's use a cold grasper. It's used  
13 for one minute during surgery at different times.

14 A. M-hm.

15 Q. Was that a "yes"?

16 A. Yes.

17 Q. Intuitive would also tell the hospital to  
18 throw that instrument away after ten uses; right?

19 A. Yes.

20 Q. So the first instrument would have been  
21 used actually in surgery for ten hours; right?

22 A. M-hm.

23 Q. "Yes"?

24 A. The total surgical time is, I believe,  
25 ten -- yes, ten hours.

1 Q. The second instrument would have been used  
2 in surgery for ten minutes; right?

3 A. Yes.

4 Q. Intuitive would tell hospitals that each  
5 one of those instruments needs to be thrown away;  
6 right?

7 A. That's true.

8 Q. Now, the instrument that's been used in  
9 surgery for ten minutes, that instrument could  
10 safely be used for surgery much longer than that;  
11 right?

12 A. Well, it depends on what it did over those  
13 ten minutes.

14 Just like the instrument that was used for  
15 an hour, if you put an instrument in for an hour and  
16 you just grab some tissue and retract and you just  
17 leave it retracting, say, the liver for 50 minutes,  
18 it's just gripped once.

19 But that instrument that was put in for one  
20 minute could have done some detailed anastomosis  
21 through some really tough tissue and grabbed a bunch  
22 of needles.

23 And so it's difficult, just using the  
24 metric of time, to determine how much wear you put  
25 on the instrument.

1 time durations that you said -- say, one minute --  
2 and been reprocessed 14 times, are you trying to say  
3 that it -- it has a lot of margin left on it  
4 relative to other instruments?

5 And I'm just saying that that's difficult  
6 to say. It's difficult for me to say, yes, it has a  
7 lot left in it.

8 BY MR. ERWIG:

9 Q. Well, one way that Intuitive could measure  
10 the life left in an instrument would be to measure  
11 the instrument based on the time that it's been used  
12 in surgery; right?

13 A. I think we talked that time is not a good  
14 metric for measuring wear and tear.

15 Q. Well, the time takes into account how --  
16 how long an instrument has been used in a given  
17 procedure; right?

18 A. That's all it takes into account.

19 Q. Another thing that you might want to take  
20 into account would be the complexity of what the  
21 instrument is being used for right?

22 A. That's right.

23 MR. RUBY: Object to the form of the  
24 question. But it's been answered.

25 ///

1 BY MR. ERWIG:

2 Q. I'm sorry. I didn't get your answer.

3 A. I said yes.

4 Q. Now, a decrementing of the life on a use  
5 counter, that doesn't take into account either the  
6 time that the instrument has been used in surgery or  
7 the complexity of what the instrument did during the  
8 surgery; right?

9 A. That's right, as far as I know.

10 Again, I don't know the details of the  
11 algorithm. But, generally speaking, if you use it  
12 in surgery, it's going to get decremented.

13 Q. That's the same whether it's been used for  
14 ten simple short procedures or ten --

15 A. Yes --

16 Q. -- complex, long procedures; right?

17 A. Yes, yes.

18 (Reporter clarification.)

19 BY MR. ERWIG:

20 Q. Now, Mr. McGrogan, do you expect that  
21 hospitals are concerned about patient safety?

22 A. Yes.

23 Q. Do you expect that hospitals inspect  
24 instruments that are going to be used on patients  
25 both before and after surgery; right?



1 Q. It's not the case that the instruments are  
2 first tested to determine their maximum number of  
3 lives; right?

4 A. Well, we do informal testing all the time.

5 Q. But when a new instrument is being  
6 developed for a customer, marketing is setting the  
7 target for that instrument before there's any  
8 testing that's conducted; right?

9 MR. RUBY: Object to the form of the  
10 question, particularly when a new product is being  
11 developed for a customer.

12 I'll object to the form of the question,  
13 but the witness may answer.

14 THE WITNESS: Marketing sets a goal for  
15 reposable instruments.

16 BY MR. ERWIG:

17 Q. Then engineering designs and tests an  
18 instrument to try to achieve that goal; right?

19 A. That's right.

20 Q. It's not that case that every instrument,  
21 for example, that's developed by engineering is  
22 tested to failure to see what the absolute maximum  
23 number of uses for it is; right?

24 MR. RUBY: Object to form of the question.

25 You may answer.

1           It's been asked many times -- several times  
2   before and answered, but you may answer again.

3           THE WITNESS: There's all sorts of informal  
4   testing that's done to establish the final number of  
5   uses that we label an instrument with.

6           MR. ERWIG: I'm going to take this exhibit  
7   down.

8           BY MR. ERWIG:

9           Q.   Now, the informal testing is performed  
10   after the initial target use number has been set by  
11   marketing for a particular instrument; right?

12          A.   It could be before; it could be after.

13          Q.   Well, when you -- for -- for example, life  
14   testing, life testing is performed after the initial  
15   target --

16          THE STENOGRAPHER: Counsel there was some  
17   interference. Can you repeat question, please.

18          BY MR. ERWIG:

19          Q.   Now, for formal life testing, formal life  
20   testing is performed after there's been a particular  
21   target set by marketing; right?

22          A.   Typically, yes, formal life testing.

23          Q.   That's ultimately what's used when  
24   Intuitive sets the life counter; right?

25          A.   Yes.